A **AMBANK (M) BHD**

v.

LUQMAN KAMIL MOHAMMED DON

B COURT OF APPEAL, PUTRAJAYA
SULAIMAN DAUD JCA
AZHAR MA'AH JCA
AZAHAR MOHAMED J
[CIVIL APPEAL NO: W-02-2294-2009]
C 8 JUNE 2011

BANKING: *Banks and banking business - Banking facilities agreement - Claim by appellant bank against guarantor - Appellant's case pleaded upon a trust receipt facility - Whether appellant departed from its pleaded* D *case - Actual or contingent debt - Whether guarantor effectively discharged from any liability*

CIVIL PROCEDURE: *Pleadings - Parties to action bound by own pleadings - Claim by appellant bank against guarantor - Appellant's case pleaded upon a trust receipt facility - Whether appellant departed from* E *its pleaded case*

CONTRACT: *Guarantee - Demand for payment - Banking facilities agreement - Claim by appellant bank against guarantor - Appellant's case pleaded upon a trust receipt facility - Whether appellant departed from* F *its pleaded case - Actual or contingent debt - Whether guarantor effectively discharged from any liability*

The appellant granted certain banking facilities to the borrower company, with the respondent (a director of the borrower) and G three others executing a letter of guarantee dated 19 March 1997 ('letter of guarantee') to act as guarantors for the facilities agreement. The borrower then applied for a letter of credit for a sum of RM805,795 favouring one of its suppliers, which the appellant issued on 22 June 1998 to said supplier. The supplier H subsequently claimed that sum against the letter of credit. The borrower, on 2 July 1998, signed the trust receipt and undertook to repay the appellant the sum of RM805,795. On 3 July 1998, the appellant released the sum to the supplier. In the meantime, the respondent, on 25 March 1998, informed the appellant that I he had resigned as a director of the borrower and also gave three

months' notice to discontinue and determine his liability under the letter of guarantee. When the borrower failed to pay the appellant the outstanding sum (which stood at RM960,431.82 at the material time) on the due date, the appellant sued the respondent for that amount in his capacity as a guarantor. The High Court judge held that the appellant could not succeed in its claim against the respondent under the letter of guarantee, and dismissed the appellant's claim. Hence, the present appeal.

Held (dismissing the appeal with costs)
Per Azahar Mohamed J delivering the judgment of the court:

(1) The appellant's case, on the facts, had been pleaded upon a trust receipt facility (which only came into existence on 2 July 1998), by which time the respondent was effectively no longer within the purview of the letter of guarantee. It was not the appellant's pleaded case that the respondent was liable contingently for monies disbursed under the letter of credit. It is a cardinal principle of pleadings that parties to an action are bound by their own pleadings; inasmuch as the parties themselves, the court is also bound by the pleadings. Therefore, the High Court judge was correct in concluding that the appellant's contention that the respondent was liable because a letter of credit was issued on 22 June 1998 was an afterthought and a departure from the appellant's pleaded case. (paras 7 & 10)

(2) When the appellant issued the letter of credit to the supplier on 22 June 1998, no contingent liability was immediately created which would have bound the respondent by virtue of cl. 1(1) of the letter of guarantee. It was not disputed that no monies had been disbursed by the appellant on or before 25 June 1998. If any contingent liability was indeed created under the letter of guarantee, it was so created on 3 July 1998 when the appellant released the monies related to the letter of credit to the supplier. There was no debt, actual or contingent, owed by the borrower as at 25 June 1998, the date the revocation of the letter of guarantee became effective. (para 17)

A ***Bahasa Malaysia*** *Translation Of Headnotes*

Perayu memberi beberapa kemudahan perbankan kepada syarikat peminjam, dengan responden (seorang pengarah peminjam) dan tiga orang lain melaksanakan surat jaminan bertarikh 19 Mac 1997 ('surat jaminan') untuk bertindak sebagai penjamin bagi perjanjian kemudahan tersebut. Peminjam kemudiannya memohon untuk mendapatkan surat kredit untuk jumlah sebanyak RM805,795 bagi pihak salah satu pembekalnya, yang perayu mengeluarkan pada 22 Jun 1998 kepada pembekal tersebut. Pembekal tersebut selepas itu menuntut jumlah tersebut terhadap surat kredit. Peminjam, pada 2 Julai 1998, menandatangani resit pegangan amanah dan memberi akujanji untuk membayar balik kepada perayu jumlah RM805,795 itu. Pada 3 Julai 1998, perayu melepaskan jumlah tersebut kepada pembekal. Sementara itu, responden, pada 25 Mac 1998, memberitahu perayu bahawa beliau telah meletak jawatan sebagai pengarah peminjam dan juga memberi notis tiga bulan untuk menamatkan dan menentukan tanggungjawabnya di bawah surat penjamin. Apabila peminjam gagal membayar jumlah yang belum dijelaskan (sebanyak RM960,431.82 pada masa yang material) pada tarikh yang wajar, perayu menyaman responden bagi jumlah tersebut dalam keupayaannya sebagai penjamin. Mahkamah Tinggi memutuskan bahawa perayu tidak boleh berjaya dalam tuntutannya terhadap responden di bawah surat jaminan, dan menolak tuntutan perayu. Oleh yang demikian, rayuan semasa dibuat.

Diputuskan (menolak rayuan dengan kos)
Oleh Azahar Mohamed H menyampaikan penghakiman mahkamah:

(1) Kes perayu, berdasarkan fakta, telah diplidkan berasaskan suatu kemudahan surat amanah (yang hanya diwujudkan pada 2 Julai 1998), dan responden pada masa tersebut sebenarnya tidak lagi termasuk dalam skop surat jaminan. Ia bukannya kes yang diplidkan oleh perayu bahawa responden bertanggungjawab secara kontingen untuk wang yang dibelanjakan di bawah surat kredit. Ia merupakan prinsip pokok pliding bahawa pihak-pihak kepada suatu tindakan diikat oleh pliding mereka; seperti juga pihak-pihak, mahkamah juga diikat oleh pliding. Oleh itu, hakim Mahkamah Tinggi adalah betul dalam memutuskan yang hujahan perayu bahawa responden bertanggungjawab kerana

surat kredit telah dikeluarkan pada 22 Jun 1998 adalah sesuatu yang difikirkan kemudian dan suatu penyimpangan dari kes yang diplidkan oleh perayu.

(2) Bila perayu mengeluarkan surat kredit kepada pembekal pada 22 Jun 1998, tiada apa-apa tanggungjawab kontingen yang diwujudkan serta-merta yang mengikat responden mengikut kl. 1(1) surat jaminan. Ia tidak dipertikaikan bahawa tidak ada wang yang telah dibelanjakan oleh perayu pada atau sebelum 25 Jun 1998. Jika tanggungjawab kontingen sememangnya diwujudkan di bawah surat jaminan, ia diwujudkan pada 3 Julai 1998 apabila perayu melepaskan wang yang berhubungan dengan surat kredit kepada pembekal. Tiada hutang, sebenar atau kontingen, yang dihutang oleh peminjam pada 25 Jun 1998, iaitu tarikh pembatalan surat jaminan menjadi efektif.

Case(s) referred to:

Bank of Meli Iran v. Barclays Bank (Dominion, Colonial and Overseas) [1951] 2 Lloyd's Rep 367 ***(refd)***

Equitable Trust Company of New York v. Dawson Partners Ltd [1926] 27 Llyods Rep 49 ***(refd)***

Farrell v. Secretary of State [1980] 1 All ER 166 ***(refd)***

Rayner (JH) & Co Ltd v. Hambros Bank Ltd [1943] 1 KB 37 ***(refd)***

Royal Bank of Scotland plc v. Cassa di Risparmio delle Province Lombarde [1992] 1 Bank LR 251 ***(refd)***

Yew Wan Leong v. Lai Kok Chye [1990] 1 CLJ 1113; [1990] 1 CLJ (Rep) 330 SC ***(refd)***

For the appellant - Hargopal Singh; M/s Hargopal Singh & Co
For the respondent - Murali Achan; M/s Kulasekar, Achan & Assoc

[Appeal from High Court, Kuala Lumpur; Suit No: D1-22-1225-2003]

Reported by Suresh Nathan

JUDGMENT

Azahar Mohamed J:

[1] This was an appeal by the appellant (the plaintiff in the High Court) against the decision of the learned judge of the Kuala Lumpur High Court given on 16 February 2009 dismissing the appellant's claim against the respondent (the defendant in the High Court).

[2] We heard the appeal on 17 February 2011, wherein at its conclusion we unanimously dismissed it with costs. We now give our reasons for so deciding.

[3] The brief antecedent facts of the case giving rise to this appeal are these. The respondent was a director of a company known as TEKNOELEKTRIK INDUSTRIES SDN BHD (the borrower). At the request and application of the borrower, the appellant offered to the borrower banking facilities. On 19 March 1997 the borrower signed a "General Agreement by Customers" (the facilities agreement) that contained the detailed terms and conditions for granting of the banking facilities. As a consideration of the appellant granting or continuing to grant the banking facilities to the borrower, the respondent and three others executed a letter of guarantee dated 19 March 1997 (the letter of guarantee) wherein the respondent and the three others jointly and severally guaranteed the repayment on demand of all monies or liability, whether actual, certain or contingent or incurred or due or unpaid to the appellant anywhere on any account whatsoever under the banking facilities and indemnifying the appellant for all losses suffered by the appellant arising out of the granting of the banking facilities to the borrower. On 1 June 1998 the borrower applied for a letter of credit for a sum of RM805,795 favouring one of its suppliers, MICROFOCUS (M) SDN BHD (the supplier) for the purchase of power optimisation tools and equipment. On 22 June 1998 the appellant issued a letter of credit to the supplier. Subsequently, on 1 July 1998 the supplier, through Maybank Berhad, claimed the sum of RM805,795 against the said letter of credit. Then on 2 July 1998 the borrower signed the trust receipt and a usance bill of exchange and collected the shipping documents wherein the borrower undertook to repay the appellant the said sum of RM805,795. On 3 July 1998 at the direction of the appellant, Maybank Berhad debited the appellant's account with the sum of RM805,795. In the meantime, on 25 March 1998 the respondent in exercise of cl. 2 of the letter of guarantee served a letter dated 24 March 1998 to the appellant informing the appellant that he had resigned as a director of the borrower and also gave three months notice to discontinue and determine his liability under the letter of guarantee. We should mention here that it is not disputed the effective date of the revocation of the letter of guarantee would be 25 June 1998. As it turned out, the borrower failed to pay the appellant the outstanding sum on the

due date. The outstanding sum owing by the borrower at the material time had stood at RM960,431.82. Later on the appellant had sued the respondent in his capacity as a guarantor for the borrower, to make good that amount. The respondent had denied liability under the letter of guarantee and had resisted the claim made against him.

[4] At the conclusion of the trial, the learned judge held that when the appellant issued the letter of credit to the supplier on 22 June 1998, no contingent liability was created that would have bound the respondent by virtue of cl. 1(1) of the letter of guarantee. According to the learned judge, if any contingent liability was indeed created under the letter of guarantee it was so created on 3 July 1998 when the appellant released the monies related to the letter of credit to the supplier. But by that time, the respondent had been effectively discharged from any liability under the letter of guarantee as of 26 June 1998. The learned judge also held that the eventual release of funds was a matter entirely at the sole discretion of the appellant. Premised on the above, the learned judge held that the appellant could not succeed on its claim against the respondent under the letter of guarantee. For that reason, the claim against the respondent by the appellant was dismissed with costs by the learned judge.

[5] Being aggrieved with the said decision, the appellant appealed to this court. When this appeal came before us, the main contention of learned counsel for the appellant was that there existed a contingent liability owing by the borrower to the appellant on or before the effective revocation of the letter of guarantee. Learned counsel argued that the respondent had become liable when the letter of credit was issued 22 June 1998, just a few days before the revocation of the letter of guarantee had become effective. It was his contention that the respondent was therefore liable for the contingent debt of the borrower as he was at the material date still a guarantor under the letter of guarantee.

[6] In resisting the appeal, learned counsel for the respondent had made two points. In the first place, it was argued that the appellant's pleaded claim was based on a trust receipt facility. The trust receipt facility only came into existence on 2 July 1998. That being so, he further argued that the appellant's contention to the

A effect that the respondent was liable because a letter of credit was issued on 22 June 1998 was an afterthought and a departure from the appellant's pleaded case. Secondly, it was argued that that on a true and correct interpretation of the phrase "contingent debt" or "contingently owing" the respondent was liable only if there B was an existing obligation prior to 25 June 1998 for the borrower to pay a debt to the appellant. He then argued that given no monies having been disbursed on or before 25 June 1998 there was therefore no existing obligation to pay and consequently no "contingent debt" or no monies "contingently owing".

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[7] We were of the view that there was merit in the argument of learned counsel for the respondent that the appellant's case had been pleaded as it were, upon the trust receipt facility which only came into existence on 2 July 1998 by which time the D respondent was already effectively no longer remained within the purview of the letter of guarantee. It has to be noted that it was not the appellant's pleaded case that the respondent was liable contingently for monies disbursed under the letter of credit. In this regard, the relevant paragraphs of the appellant's statement of E claim formulated against the respondent are in the following terms:

11. The plaintiff states that the said borrower used the said trust receipt facility and as at 30 November 1998 owed the plaintiff a sum of RM849,600.44 particulars of which are fully known to the said borrower and the guarantors including the F defendant named herein above.

12. As a result of the said borrower's failure to repay the said trust receipt facility on and/or before the maturity date that is 30 September 1998, the plaintiff sent a notice dated G 8 December 1998 to the said borrower wherein the plaintiff demanded the total sum outstanding as at 30 November 1998 of RM849,600.44. However, the said borrower failed to pay the said sum to the plaintiff. The plaintiff shall refer to the said notice dated 8 December 1998 to show its full effect and H result at the hearing of this case.

13. Due to the failure of the said borrower in repaying the said sum as herein above, the plaintiff *vide* a letter of demand by the plaintiff's solicitors dated 15.03.1999 demanded from the I said borrower and the said guarantors the outstanding sum for the said trust receipt facility of RM872,549.04 as at 28 February 1999 together with interest calculated as follows:

(i) Interest at the rate of 2.5% above the plaintiff's base lending rate (that as at 28 February 1999 was 8.05% per annum) calculated from 1 March 1999 until the date of full settlement; and

(ii) Overdue interest at the rate of 1.0% per annum on the amount outstanding and calculated from the maturity date of 30 September 1998 until the date of full settlement.

[8] From all these, we gather that the appellant's case as pleaded was that the respondent was liable for monies disbursed under the borrower's account pursuant to the trust receipt facility.

[9] Furthermore, apart from the appellant's pleaded case, the contemporaneous documents relied on by the appellant also supported the respondent's contention that the appellant's claim was in point of fact based on monies owing under the trust receipt facility. Among others, the documents are:

(a) The letter of demand dated 23 May 2003.

(b) The account statement under the caption "Facility Trust Receipt".

(c) The certificate of indebtedness which refers to a sum owing under a trust receipt facility.

[10] Now, it is a cardinal principle of pleadings that the parties to an action are bound by their own pleadings. We need to remind ourselves that the court is also bound by the pleadings in as much as the parties themselves. This must be emphasized since the court is not unconstrained to decide on an action on which no issue has been raised by the parties in their respective pleadings (see: *Yew Wan Leong v. Lai Kok Chye* [1990] 1 CLJ 1113; [1990] 1 CLJ (Rep) 330 and *Farrell v. Secretary of State* [1980] 1 All ER 166). Therefore, in our view, the learned judge was correct in concluding that the appellant's contention that the respondent was liable because a letter of credit was issued on 22 June 1998 was an afterthought and a departure from the appellant's pleaded case. On this ground alone, this appeal must be dismissed.

[11] Still for completeness, we shall deal at this point the point raised by learned counsel for the appellant that there existed a contingent liability owing by the borrower to the appellant before the effective revocation of the letter of guarantee. We have given our utmost consideration of the argument but we found ourselves, in the circumstances of the present case, quite unable to agree with the contention of learned counsel. Our reasons now follow. First we will quote the portion in cl. 1(1) of the letter of guarantee that is relevant to the current discussion as follows:

> In consideration of Arab-Malaysian Bank Berhad (hereinafter called "the Bank" which express/on shall where the context so admits, include the Bank's successors and assigns) making continuing advances or otherwise giving credit or affording banking facilities for as long as the Bank may think fit or granting time to Teknoelektrik Industries Sdn Bhd (hereinafter called "the Customer") at my/our request, I/we hereby jointly and severally guarantee to the Bank the payment of and undertake on demand being made to me/us or any of us by the Bank to pay and satisfy to the Bank forthwith all money or liability whether actual certain or contingent now or hereafter owing or incurred or due and unpaid to the Bank anywhere on any account whatsoever whether from the Customer solely or from the Customer jointly with any other person or persons or from any firm in which customer may be a partner including the amount of notes or bills discounted or paid and other loans credits or advances made to or for the accommodation or at the request either of the Customer solely or jointly with any person and in whatever name style or firm or of any such firm as aforesaid or for any money for which the Customer may be liable as principal or surety or in any other way whatsoever … .

[12] We are mindful that the relevant part in the above clause conferred on the appellant to demand monies from the respondent as a guarantor that are "contingently owing" by the borrower. In this regard, it was the argument of learned counsel for the appellant that upon issuance of the said letter of credit by the appellant on 22 June 1998, a contingent liability was created. Therefore, it was argued, the borrower owed the appellant a contingent liability on 22 June 1998.

[13] We do not agree. In our view, the appellant's contention that the borrower owed a contingent debt upon issuance of the letter of credit is misconceived because the mere issuance of the

letter would not trigger an immediate creation of a contingent liability thereof which would bind the respondent as a guarantor. The important thing to remember is, first, the letter of credit in question provides among others, that "THIS DOCUMENTARY CREDIT IS SUBJECT TO THE UNIFORM CUSTOMS AND PRACTICE FOR DOCUMENTARY CREDITS (1993 REVISION) BY THE INTERNATIONAL CHAMBER OF COMMERCE PUBLICATION NO 500 (UCPDC 500)". The UCPDC is an international code of practice designed to protect all parties to a letter of credit. It has an important role in the conduct of trade. The UCPDC is in effect a set of model terms, which have legal effect when incorporated into the text of the letter of credit (see: *Royal Bank of Scotland plc v. Cassa di Risparmio delle Province Lombarde* [1992] 1 Bank LR 251).

[14] That is why, it is very important to take a closer look at some of the provisions in UCPDC in so far they are relevant to the present case. First and foremost, we think it would be useful to look at the definition of letter of credit. For this we turn to art. 2 which provides:

> For the purpose of these Articles, the expressions 'Documentary Credit(s)' and 'Standby Letter(s) of Credit' (hereinafter referred to as 'Credit(s)'), mean any arrangement, however named or described whereby a bank (the 'Issuing Bank') acting at the request and on the instructions of a customer (the 'Applicant') or on its own behalf:
>
> i. is to make a payment to or to the order of a third party (the 'Beneficiary'), or is to accept and pay bills of exchange (Draft(s)) drawn by the Beneficiary,
>
> or
>
> ii. authorizes another bank to effect such payment, or to accept and pay such bills of exchange (Draft(s)),
>
> or
>
> iii. authorizes another bank to negotiate,
>
> against stipulated document(s), **provided that the terms and conditions of the Credit are complied with**. (emphasis added)

It is important to note that under the law of letter of credit, the parties deal with documents and not goods (see: art. 4 of the UCPDC). Then art. 9 provides that the obligation to pay only arises if the stipulated documents are presented and the terms and conditions of the credit are complied. But it is more than this. Article 13(a) stipulates that the bank has a duty to examine the documents with reasonable care and to ascertain whether they appear on their face to be in compliance with the terms and conditions of the credit. Of greater relevance in the context of the present case is art. 14 which provides that if the documents appear on their face not to be in compliance with the terms and conditions of the credit, the bank may refuse to take up the documents.

[15] It is trite that under the law of letter of credit, documents presented under a credit must stringently abide by the terms and conditions of the credit. The bank will only release payment if it is in possession of all conforming documents. This strict compliance principle was shown in a number of cases. We would only draw attention to the following cases: *Equitable Trust Company of New York v. Dawson Partners Ltd* [1926] 27 Llyods Rep 49, *Rayner (JH) & Co Ltd v. Hambros Bank Ltd* [1943] 1 KB 37 and *Bank of Meli Iran v. Barclays Bank (Dominion, Colonial and Overseas)* [1951] 2 Lloyd's Rep 367).

[16] By virtue of these provisions in UCPDC and case law authorities, the appellant's obligation to pay the supplier under the letter of credit in question only arises if the stipulated documents are presented and the terms and conditions of the credit are met. Where the documents are non-conforming the appellant must reject the document and refuse payments.

[17] With the above considerations in mind, we were of the view that that when the appellant issued the letter of credit to the supplier on 22 June 1998, no contingent liability was immediately created that would have bound the respondent by virtue of cl. 1(1) of the letter of guarantee. It is not disputed that no monies had been disbursed by the appellant on or before 25 June 1998. If any contingent liability was indeed created under the letter of guarantee it was so created on 3 July 1998 when the appellant released the monies related to the letter of credit to the

supplier. In our view, on the facts of the present case as contained in the appeal record taken as a whole, there was no debt actual or contingent owed by the borrower as at 25 June 1998, the date the revocation of the letter of guarantee became effective.

[18] For all the reasons stated, we unanimously dismissed the appeal with costs in the sum of RM10,000. Further we ordered the deposit to be paid to the respondent towards account of costs.